

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission)	
On Its Own Motion)	
)	02-0844
Amendment of 83 Ill.Adm.Code 551)	

**RESPONSE OF PEOPLES ENERGY SERVICES CORPORATION TO
STAFF'S SECOND COMMENTS REGARDING FIRST NOTICE OF RULEMAKING**

Pursuant to the Administrative Law Judge's Notice of Schedule dated April 23, 2003, Peoples Energy Services Corporation ("PE Services"), an Alternative Gas Supplier ("AGS") in the State of Illinois and party to this case, submits this Response to Staff's Second Comments on the Commission's proposed rules revising Part 551, Certification of Alternative Gas Suppliers, 83 Ill.Adm.Code 551. Staff's Second Comments would amend Section 551.80, Financial Qualifications, to require AGS to project their future revenues in order to meet the financial qualifications. Apparently, Staff believes this change is justified due to the recent Dominion acquisition of Nicor Energy's natural gas customers. The Commission should reject Staff's proposed revenue forecasting requirement because it inflicts additional hardship and cost on AGS without any corresponding benefit to customers.

PE Services first addresses its objections to this change: A) Staff's rationale for the change is contrary to both the record in Docket 02-0176 when Part 551 was adopted and history; B) there is no change to Article 19 language that contemplates such a change in the current Part 551; C) the ARES rules do not have a similar requirement although the same situation can and has happened in the electric market; D) the proposed language is vague and ambiguous; and E) Staff proposing a major

change to its own rule subsequent to the First Notice publication in the Illinois Register is contrary to the spirit and intent of the Illinois Administrative Procedure Act's rulemaking procedures, 5 ILCS 100/5-5, *et seq.* ("APA"). Finally, PE Services requests the Administrative Law Judge and Commission to clarify Staff's intent as to whether its proposed change affects only applicants or also existing AGS making their annual compliance filings pursuant to Sections 551.120 and 551.140.

I. PE SERVICES' OBJECTIONS TO STAFF'S PROPOSED LANGUAGE.

A. Staff's Rationale is Contrary to Both the Record in Docket 02-0176 When the Rule was Adopted and History.

Staff correctly states that the current Section 551.80 requires an AGS applicant to base its required financial resources on its most recent fiscal year revenues. Staff Second Comments, p. 1. Staff then supports its suggested language by further stating that "[t]he comparison contemplates that an applicant's revenue will slowly grow as it acquires customer accounts over an extended period of time." Id. Staff does not and cannot support this statement by any record evidence from the Docket 02-0176 proceeding under which the current rule was adopted.

The current rule bases financial requirements on historical information because the information is known and available and because it provides sufficient security. Importantly, with the possible exception of a year following a year with abnormally high gas prices, an AGS, like an Alternative Retail Electric Supplier ("ARES"), would probably always expect higher revenue. Staff's statement that the rule contemplates slow market revenue growth over an extended period of time is contrary to the history in the market. Retail gas marketers have operated in Illinois since the mid-1980s'. Over the more than fifteen years they operated before the legislature enacted Article 19,

there were many consolidations through marketers purchasing customer accounts from other exiting marketers - as was done between Dominion and Nicor Energy.

The current ARES and AGS rules assure adequate protection even though increased revenues are always contemplated. None of the orders issued in Docket 02-0176 addresses what type of growth was contemplated when the Commission adopted the rule. Further, nowhere in the Staff Report dated February 22, 2002 that the Commission made part of the record in Docket 02-0176 and relied on to implement the rule, does Staff address revenue growth. Staff Report, Docket 02-0176, Feb. 22, 2002 and First Notice Order, Docket 02-0844, Feb. 27, 2002, p. 4. Therefore, the Commission should reject Staff's proposed language because there is not factual basis for the change.

B. The Article 19 Amendments Do Not Contemplate Such a Change to Part 551.

It is important to remember that the purpose of this preceding is to ensure consistency between Part 551 and Article 19 of the Public Utilities Act ("Act"), 220 ILCS 5/19-101, *et seq.*, that has been revised to extend the provisions that originally governed only AGS serving residential customers to now apply also to AGS serving small commercial customers. See, Initiating Order, Docket 02-0844, Dec. 17, 2002, p. 1. The current Part 551 became effective August 1, 2002. The legislature amended Article 19 to make it apply to small commercial customers on August 26, 2002. The Commission should reject the proposed language because neither the Article 19 amendments nor the Staff report that initiated this rulemaking contemplated such a drastic change from the current rule. See, Staff Report, Docket 02-0844, Dec. 2, 2002, pp. 5-10.

C. The ARES Rules Do Not Have a Similar Requirement.

As Staff stated in its report to the Commission dated February 22, 2002 that initiated the current rules adopted by the Commission in Docket 02-0176, Staff based the AGS rules on the ARES rule. Staff Report, Docket 02-0176, Feb. 22, 2002, p. 1. Significantly the report states, "Staff believes that an AGS poses lower risks to a residential customer and to the delivery infrastructure than an ARES. Hence, Staff is recommending lower financial requirements for an AGS serving residential customers than an ARES."

Article 19 details a much lesser regulatory framework concerning AGS than Article 16 does concerning ARES. Importantly, according to press reports, New Energy's ARES acquired a large number of Nicor Energy's electric customers, but New Energy would have no requirement under the Commission's ARES Rules, Part 451 financial requirements, to adjust to "expected" revenues. Part 551.80 financial requirements should not be more burdensome than Part 451 financial requirements. Rejecting Staff's proposed Section 551.80 language would be consistent with the ARES rules and Staff's position on which the Commission relied in adopting Part 551.

D. The Proposed Language is Vague and Ambiguous.

Since Staff's proposed language if adopted by the Commission will become Illinois Law, it is important that the requirement be clear to both AGS required to comply with it and Commissioner's and Staff required to enforce it. The proposed language is both vague and ambiguous thus making it ripe for uncertain compliance and application. The new language requires AGS to have available credit of 5% of the applicant's most

current fiscal year revenue “adjusted for any amount of revenue expected from customers accounts acquired or expected to be acquired.” Staff Second Comments (emphasis added). How can an AGS determine revenues “expected” or accounts “expected” to be acquired? Revenue expectations are based on a myriad of variables especially when considering an acquisition. For instance, if all of the certified AGS - Dominion, PE Services, Corn Belt, MX Energy, Santana and Shell Energy – had been bidding or negotiating or considering on bidding or negotiating with Nicor Energy to acquire its natural gas AGS customers, were any or all expecting additional revenues? Would any or all have had to project additional revenues when calculating its financial requirements under proposed Section 551.80? The Commission should reject Staff’s proposed revenue forecasting requirement because the language is vague and ambiguous. Also, due to the vagueness and ambiguity of the language, if the Commission adopted the provision it would be adopting discretionary powers under Section 5-20 of the Illinois Administrative Procedures Act (“APA”), which requires that the Commission include precise and clear standards by which the Commission will exercise its discretionary power. 5 ILCS 100/5-20

E. The Timing of Staff’s Proposed Language is Contrary to the Spirit and Intent of APA Rulemaking Procedures.

Article 5 of the APA details the rulemaking provisions. Staff did not propose this language in its Staff Report dated December 2, 2002 that was the impetus for this proceeding. See, Staff Report, Docket 02-0844, Dec. 2, 2002, pp. 5-10. The Commission made the Staff report part of the record and sent Staff’s proposed language, less these proposed charges, to First Notice pursuant to the Initiating Order. See, Initiating Order, Docket 02-0844, Dec. 17, 2002. The proposed rule was published

in the Illinois Register on January 3, 2003 where any interested party was made aware of Staff's proposed rule and their right to comment within 45 days. 27 Ill.Reg.12, Jan. 3, 2003. APA Section 5-40 details the general rulemaking requirements. Subsection (b) requires that the first notice include: §§ (1) the old and new materials of a proposed amendment; and §§ (3) a complete description of the subjects and issues involved. Subsection (b) further provides that the Commission accept comments from interested parties. Section 5-40 does not provide for the Commission making substantive changes to the rule it proposed that were not offered by persons in response to the First Notice publication.

Staff making substantive changes to its proposed rule after First Notice is contrary to the spirit and intent of Article 5 of the APA and is an action the Commission should use serious restraint in approving. The purpose of First Notice is for parties to determine whether or not they agree with the rule or amendment published in the Illinois Register and whether they desire to make comments. Persons cannot know whether they object to Staff's proposed rules where the proposals are not included in the First Notice because they are not published in the Illinois Register. The Commission should reject Staff's proposed language because it should assure an open and fair rulemaking process and the APA framework is contrary to Staff proposing this substantive change after First Notice.

II. EFFECT OF THE PROPOSED LANGUAGE ON AGS REPORTING CONTINUING COMPLIANCE.

Staff presented this new language at the status hearing on April 21, 2003. Parties questioned Staff whether its intent was to have this provision apply only to applicants or also to the annual compliance filing required under Sections 551.120 and

551.140. In essence, Staff responded that the rule speaks for itself. Staff's Second Comments rationale only addresses how Section 551.80 changes will apply to applicants. The Section 551.80 language Staff proposes on its face only applies to applicants. If the Administrative Law Judge and Commission do not reject Staff's proposed language for any of the reasons PE Services articulated above, PE Services requests that the Administrative Law Judge direct Staff to specifically state whether it intends that the proposed language will also apply to AGS submitting any compliance filing to demonstrate continued compliance with Part 551. If so, Staff should be required to specifically state what language in Sections 551.120 or 551.140 incorporates its changes, either directly or by reference, to make the proposed forecasting requirement apply to AGS' annual compliance filings.

WHEREFORE, PE Services urges the Administrative Law Judge to reject Staff's proposed Section 551.80 language changes included in its Second Comments. In the alternative, PE Services requests that if the Administrative Law Judge and Commission do not reject Staff's proposed language, that Staff be directed to state whether Staff intends that its proposed Section 551.80 language changes will apply to AGS annual compliance filings and, if so, by what authority.

Respectfully submitted,

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NOTICE OF FILING AND CERTIFICATE OF SERVICE

To: Service List

PLEASE TAKE NOTICE that on this 9th day of May 2003, I have filed with the Chief Clerk of the Illinois Commerce Commission, the Response of Peoples Energy Services Corporation to Staff's Second Comments Regarding First Notice of Rulemaking, a copy of which is hereby served upon each of the parties of record in Ill.C.C. Docket No. 02-0844 by placing a copy thereof in the United States mail with first class postage affixed, by e-mail, UPS or personal delivery.

Dated at Chicago, Illinois this 9th day of May 2003.

By _____
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